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No. 91-948

In The

Supreme Court of the United States

October Term, 1991

CHURCH OF THE LUKUMI BABALU AYE, INC. AND ERNEST PICHARDO,

Petitioners,

v.

CITY OF HIALEAH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF JAMES ANDREWS AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE CHRISTIAN LEGAL SOCIETY, THE FIRST LIBERTY INSTITUTE, AND THE RUTHERFORD INSTITUTE, IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether city ordinances specifically directed at the ancient and bona fide religious practices of ritual animal killing violate the Free Exercise Clause of the First Amendment in the absence of an articulated compelling governmental interest in public morals, health, or safety.

Whether the Court should reaffirm its teaching that the Free Exercise Clause mandates governmental neutrality, not official hostility, toward religion.

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INTERESTS OF AMICI CURIAE

Amici curiae are national and international organizations that defend against constitutional infringement of the first of our civil liberties protected under the First Amendment, religious freedom. None of the *amici* espouses or endorses the doctrines or practices of petitioners, and many of the *amici* organizations consider those practices morally repugnant. Nonetheless, *amici* are committed to the proposition that all sincere religious practices are equally entitled to the protection of the law, and are convinced that the lower court decisions in this case did not live up to this standard. In the words of the Williamsburg Charter, a bicentennial document celebrating religious liberty, "Rights are best guarded and responsibilities best exercised when each person and group guards for all others those rights they wish guarded for themselves." 8 J. Law & Relig. 5, 18 (1990).

This is a case of particular importance to *amici* and other religious organizations because it offers this Court the first opportunity to clarify its teaching in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990) that banning acts only when they are engaged in for religious reasons – in short, religious discrimination – is most strenuously prohibited under the Free Exercise Clause.

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

REASONS FOR GRANTING THE WRIT

This case involves a series of ordinances passed by the City Council of the City of Hialeah, Florida (hereinafter "Hialeah"), in June and September, 1987. These ordinances were specifically intended to stop the ritual sacrifice of animals, a religious practice that is apparently offensive to some of Hialeah's citizens. Neither Hialeah nor the State of Florida generally prohibits the killing of animals. One can get Chicken McNuggets in Hialeah, but one may not kill a chicken for religious reasons. Neither Hialeah nor the State of Florida prohibits the killing of animals under secular circumstances that raise identical (or even more serious) concerns of cruelty to animals, public health or zoning. These concerns were the sole reasons cited by the court of appeals to justify the ordinances. The ordinances are thus "specifically directed at [petitioners'] religious practice" and are therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990).

Amici wish to make four related points. First, the practice of animal sacrifice, though contrary to the religious convictions of many, is an ancient, long-standing, well-established, sincere religious practice. Indeed, the sort of animal sacrifice practiced by the Church of the Lukumi Babalu Aye is not dissimilar to the practices ordained for the people of Israel by the Holy Bible. Second, the court of appeals ignored the teaching of this Court that the Free Exercise Clause requires governmental neutrality toward religion. Although the district court expressly found that "the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah," Pet. App. 23, it

nonetheless upheld the ordinances.[1] Third, the purported governmental interests invoked by the district court are insufficient as a matter of law because they do not justify the differential treatment meted out to those who kill animals out of obedience to religious command and those who kill animals for food, science, pest control, animal population control or sport. Fourth, *amici* wish to identify for this Court some of the shoals endangering religious freedom that lie along the new course of First Amendment analysis that this Court has charted in *Smith*. Agencies of the federal and state governments as well as the lower courts have in many instances misconstrued this Court's teaching in *Smith*. When, as here, agencies of government turn a blind eye toward invidious discrimination against a vulnerable religious minority, it is time for this Court to clarify that *Smith* does not countenance official hostility toward religion.

I. ANIMAL SACRIFICE IS AN ANCIENT AND SINCERE RELIGIOUS PRACTICE THAT IS PROTECTED UNDER THE FIRST AMENDMENT

Animal sacrifice may now seem abhorrent to many Americans, but it remains an integral part of religion in much of the world. The roots of this practice lie in the ancient history of what are now Judaism, Christianity, and Islam. Indeed, the practices the City seeks to prohibit

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[1] Reference is frequently made in this brief to the opinion of the district court because the court of appeals largely adopted the analysis of the district court in an unpublished per curiam order. Pet. App. 2.

are virtually indistinguishable from the practices of animal sacrifice mentioned throughout the Bible. *E.g.*, Leviticus, chapters 1-7 (the requirements in Torah for animal sacrifice); I Kings 8:62-66 (animal sacrifice at the dedication of Solomon's temple); Luke 2:22-24 (ritual sacrifice on behalf of Joseph and Mary at the eighth day following the birth of Jesus Christ); see R. deVaux, *Ancient Israel: Its Life and Institutions* 415-23 (1961); R. deVaux, *Studies in Old Testament Sacrifice* (1964); Gaster, "Sacrifices and Offerings, OT," in 4 *Interpreter's Dictionary of the Bible* 147-59 (1962) (collecting and discussing biblical texts referring to animal sacrifice). In Islamic faith *'Id al Adha* is the festival of sacrifice, on which devout Muslims throughout the world join the pilgrims in Mina in sacrificing a small animal in remembrance of the sacrifice of a ram by Abraham in place of his son Ishmael. See *The Qur'an* 37:102; and see Schimmel, "Islamic Religious Year," 7 *Encyclopedia of Religion* 456 (M. Eliade ed. 1987).

Profound theological reasons – having nothing to do with cruelty to animals – explain why animal sacrifice was abandoned in the Jewish religion and was never practiced in the Christian religion. But those theological reasons do not bind the Church of the Lukumi Babalu Aye and must not be imposed upon them. In the Jewish faith, sacrifice was abandoned when the Romans destroyed the Second Temple in 70 A.D.[2] In the Christian

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[2] Worship in ancient Israel occurred at several shrines. After the reform initiated under King Josiah (640-609 B.C.E.), however, the priestly and sacrificial functions were exclusively tied to the Jerusalem Temple and could not be performed elsewhere. The Temple of Solomon was destroyed by the

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faith, animal sacrifice is no longer practiced because of the theological view that it was rendered forever unnecessary by the ultimate sacrifice of the pure Lamb of God on the cross at Calvary; see, e.g., Letter to the Hebrews 7:27; 9:1-23; 10:1-10; 1 Peter 1:18-19; 1 John 1:7; 2:2; Rev. 5:9; 7:14; 12:11.

These theological developments make many in the Christian and Jewish faiths reluctant to defend a practice today that seems so foreign to their own doctrines. But the sensibilities of the majority are no test of religious truth, and members of minority religions have no less right to practice their faith merely because others recoil from it. Animal sacrifice is not "unnecessary" killing, as the City, the State Attorney General and the district court have labeled it. Viewed from the only perspective permitted under the First Amendment – that of the religious adherents – sacrifice is utterly vital, an indispensable aspect of their worship. Petitioners are not asking for public support or endorsement for their beliefs. They ask only to be left alone to practice their rituals as they have been practiced for 4,000 years. To use the words of James Madison, principal author of the First Amendment, petitioners ask only for the "equal right of every citizen to the free exercise of his Religion according to the dictates

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Babylonians in 587 B.C.E. After the return from the exile in 535 B.C.E., the Jews built a Second Temple in Jerusalem, which the Romans destroyed in 70 A.D. Some Jews believe that the sacrifices commanded in the Hebrew scriptures should be resumed if the Temple is restored in Jerusalem. A dissident group of Samaritan Jews still continues the ancient practice of sacrifice on Mount Gerizim in Samaria.

of conscience." Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 15, reprinted at 330 U.S. 63, 71.

II. THE ORDINANCES UNDER CHALLENGE ARE UNCONSTITUTIONAL BECAUSE THEY ARE SPECIFICALLY DIRECTED AT A RELIGIOUS PRACTICE AND ENTANGLE THE CITY IN THEOLOGICAL JUDGMENTS

As the district court acknowledged, the ordinances under challenge "are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah." Pet. App. 23. They are unconstitutional for that very reason.

Ordinance 87-71 prohibits animal "sacrifice" in "a public or private ritual or ceremony not for the primary purpose of food consumption." The killing of animals is not illegal in Hialeah. Only the killing of animals in a "ritual or ceremony" is illegal. The ordinance is "specifically directed at [petitioners'] religious practice" and is therefore unconstitutional. *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 1599 (1990). Indeed, this ordinance cannot be distinguished from an example given by this Court in *Smith*:

> It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Id. The ordinance may be contrasted with the Oregon anti-drug law upheld in *Smith*. That law applied to everyone, and the Supreme Court held that no exception was required for the Native American Church. Here, there is no law against killing animals, but a special exception was made to prohibit killing animals in a ritual or ceremony.[3]

The rule against laws specifically directed at religious practices has a strong basis in the history of the Free Exercise Clause. The writings of John Locke on religious toleration, which were closely studied by Thomas Jefferson, are generally regarded as stating the minimum content of the Free Exercise Clause.[4] Indeed, even those scholars who have espoused a narrow interpretation of the rights protected by the Free Exercise Clause have relied on Locke as their primary authority.[5] Locke wrote:

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[3] It is no answer to say that there may be some non-religious rituals or ceremonies to which the ordinance may apply. No such occasions have occurred in Hialeah, and it is undisputed that the ordinance was adopted in specific response to the petitioners' announcement of the opening of a church. Pet. App. 22-23.

[4] See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1430-37, 1443-49 (1990).

[5] *E.g.*, W. Berns, *The First Amendment and the Future of American Democracy* (1985); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978).

"Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses."[6] Indeed, as if anticipating this very case, Locke specifically defended the right to animal sacrifice so long as animals were killed for food: "if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that that ought to be prohibited by a law. . . . [W]hat may be spent on a feast may be spent on a sacrifice."[7] The ordinances here cannot be upheld without rejecting the clear historical understanding of the Free Exercise Clause, and the view of the founders that religious freedom is an inalienable right. See Declaration of Independence, 1 Stat. 1 (1776).

Ordinance 87-52 is unconstitutional for the same reason. Paragraph 1 forbids any person to sacrifice or slaughter certain animals "intending to use such animals for food purposes." Paragraph 2 includes within the ban "any group or individual that kills, slaughters or sacrifices animals for any type of ritual," whether or not the flesh is consumed. Paragraph 3 exempts licensed slaughterhouses and other uses permitted under state and local law. When the fog clears, the only killing of animals this ordinance prohibits is that for religious purposes.

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[6] J. Locke, "A Letter Concerning Toleration," in 35 *Great Books of the Western World* 13 (R. Hutchins ed. 1952).

[7] *Id.* at 12-13.

Ordinance 87-72 forbids the "slaughter" of animals except in licensed slaughterhouses or by individuals or groups who slaughter "small numbers of hogs and/or cattle." This ordinance is susceptible to more than one interpretation. Many persons in Hialeah kill animals for various purposes, including for food, but are not deemed to fall within the strictures of the ordinance (apparently because the killing is not in large quantities or for commercial purposes). For example, hunters kill animals for domestic consumption or for the sport of it, and fishermen kill fish for the same reasons, but their actions are not deemed to fall within the ordinance. Like hunters and fishermen, petitioners kill animals and often eat them, but they do not do so in large quantities or for commercial purposes. Either the ordinance does not apply to petitioners' church, which does not slaughter animals commercially for food, or the ordinance has been applied on a discriminatory basis, in violation of *Smith*. See Pet. at 14.

Moreover, if petitioners are deemed to be engaged in the "slaughter" of animals during their rituals, and thus subject to Ordinance 87-72, they are protected under Florida state law, which specifically allows "ritual slaughter." Fla. Stat. Ann. § 828.22(3) (1985). The Florida Attorney General has opined that petitioners are not protected by this statute because they are engaged in "sacrifice" rather than "slaughter," and that the exemption for ritual slaughter applies only to "the killing of animals for food." Fla. Att'y. Gen. Opin. 87-56, Annual Report 146, 149 (1987). The Florida authorities cannot have it both ways. Either petitioners' activity constitutes "slaughter"

and is protected under state law, or it does not, in which case Ordinance 87-72 does not apply.

Ordinance 87-40 provides that anyone who "unnecessarily . . . kills any animal . . . in a cruel or inhumane manner, is guilty of a misdemeanor." This ordinance presents two constitutional problems.

First, the government has no authority to determine which religious rituals are "necessary" and which are not. Nor may it determine that religious activities in general are "unnecessary." This is a theological judgment, outside the ken of government. To the members of the Church of the Lukumi Babalu Aye, the sacrifice of animals is truly necessary, as necessary to them as the Mass is to a Catholic or keeping the Sabbath is to an observant Jew (and more necessary than other forms of killing permitted in Hialeah).

In this respect, the ordinance is indistinguishable from the state law struck down in *Sherbert v. Verner*, 374 U.S. 398 (1963), as reaffirmed and interpreted in *Smith*, 494 U.S. 872, 110 S. Ct. at 1603. In *Sherbert*, the state disallowed unemployment benefits if the worker refused suitable employment "without good cause." The state did not include religious objections in the variety of reasons within this "good cause" provision. This Court held that the state's refusal to include religious reasons within the universe of "good cause" was unconstitutional. As the Court stated in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." 494 U.S. 872, 110 S. Ct. at 1603. Here, the City allows the killing of animals (even "in a cruel or inhumane manner") where the killing is "necessary." This requires an individuated determination. Having set up such a system, the City may not refuse to extend it to cases of religious necessity.

In effect, the City has declared the central religious practice of the Church of Lukumi Babalu Aye "unnecessary," while exempting a wide variety of secular activities from the strictures of Ordinance 87-40. That is a judgment the government has no authority to make.

The second constitutional problem with Ordinance 87-40 is that its definition of "cruel or inhumane" methods of killing has been applied in a discriminatory fashion. As the evidence below showed, petitioners' method of animal sacrifice is painless and quick in almost all cases. The district court, however, credited testimony that there is "no guarantee" that this will always be the case. Pet. App. 13. Yet the City has allowed other forms of killing, including hunting and extermination, that are likely to cause more pain and fear in animals. It is only the religious killing of animals that is required to provide an iron-clad "guarantee" of humaneness.[8]

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[8] The district court required the petitioners to prove that no serious risk of harm would result from their worship services. Pet. App. 13, 45-46, 46 n. 59, discussed in Pet. at 21-22. The burden of demonstrating harm, however, falls on the government, not a religious claimant. The district court thus inverted the entire concept of who is supposed to be restrained by the free exercise clause from doing what and to whom.

Accordingly, each of the ordinances under challenge is constitutionally flawed. One prohibits a religious practice on its face (Ord. 87-71). Two more do so by interpretation of their terms (Ord. 87-40 and 87-52). And the fourth does so by discrimnatory application of commercial regulations to a noncommercial religious practice (Ord. 87-72). If the City wishes to pursue legitimate public policy objectives, it must do so in a constitutional manner. While *amici* do not know what form future legislation might take, we suspect that the City might be forced to reconsider how powerful its interests are in this matter if it had to apply the same rules to hunting and other socially acceptable forms of killing that it applies to this unfamiliar and unpopular minority religion.

III. THERE IS NO COMPELLING GOVERNMENTAL INTEREST SUPPORTING THE DISCRIMINATION AGAINST RELIGION IN THIS CASE

The district court was blind to the discrimination present in the Hialeah ordinances. Pet. App. 49. Even though the district court acknowledged that the kosher laws of the Jewish faith are protected by state law and are thus effectively gerrymandered out of the Hialeah ordinances, Pet. App. 31, it ignored the Court's teaching on this subject, adumbrated in earlier cases such as *Larson v. Valente*, 456 U.S. 228 (1982). Since the district court reached its decision before this Court's decision in *Smith*, it obviously intimated no view on that case.[9]

[9] This Court's inclusion of this case in a string citation in *Smith*, 110 S.Ct. at 1605, cannot be viewed as a determination of

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Ruling after this Court's decision in *Smith*, the court of appeals can only be construed to have misunderstood or to have ignored the Court's teaching on religious discrimination. Both the petitioners and *amici* emphasized this point in their briefs before the court of appeals, but that court merely declined to "decide the effect of *Smith* in this case." Pet. App. 2.

One of the reasons the Court narrowed the range of free exercise claims in *Smith* was to ensure that the compelling governmental interest standard is not "water[ed] down" but rather "really means what it says." 494 U.S. 872, 110 S. Ct. at 1605. Thus, to override a free exercise claim a governmental interest must be truly "compelling" – that is to say, necessary and of the highest order. *Id.*

The district court purported to find the City's interest in enforcing the ordinances against animal sacrifice "compelling," Pet. App. 43-45, but it committed a basic error in this analysis. In a claim of discrimination against religion, the question is not whether the law has a compelling purpose in the abstract, but whether the distinction drawn between religious and secular activities serves a compelling interest.

Amici doubt that the government *ever* could have a compelling interest in forbidding for religious purposes

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the merits of the case before it had been subjected to the rigorous review of First Amendment claims required under *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Indeed, the very fact that the court of appeals did not undertake its responsibility under *Bose* is an independent reason for granting the writ.

an activity it permits for other purposes. See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 60 U.S.L.W. 4029, 4034-35 (Dec. 10, 1991) (Kennedy, J., concurring) (when government restricts speech by discriminating on the basis of the content of the message, it should not be allowed to prevail even by a showing of a compelling interest for the discrimination). Certainly no such interest was demonstrated here. As the petition ably shows, there are many secular activities that pose the same (or worse) threat to the government's interest than is posed by petitioners' religious services. Unless the City can justify singling out religion for peculiar burdens (and it has not even tried), the ordinances must be struck down.

In *Smith*, this Court reaffirmed that a strict requirement of nondiscrimination is the core of the Free Exercise Clause. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

IV. THIS COURT SHOULD REAFFIRM ITS CONDEMNATION OF OFFICIAL HOSTILITY TO RELIGION

Smith clearly marked a major shift in free exercise doctrine. As with any new formulation of doctrine, this one may take some adjustment and fine tuning before it becomes settled. After *Smith*, governmental agencies have

recklessly disregarded the protections that the Constitution affords to religious conscience, belying the promise in *Smith* that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the local level, zoning laws have been invoked – as they were here – both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister. See, e.g., *Bethel Evangelical Lutheran Church v. Village of Morton*, 201 Ill. App. 3d 858, 559 N.E. 2d 533, app. denied, 135 Ill. 2d 554, 564 N.E. 2d 835 (1990) (post-*Smith* cap on enrollment of students in parochial school); and see R. Niebuhr, "Here Is The Church," *Wall Street J.*, Nov. 20, 1991, at A1, col. 4. Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we even had regulations purporting to tell the Amish what to wear when they raise a barn. See, e.g., OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites).[10]

The judicial record after *Smith* also betrays a similar insensitivity to religious liberty that may eventually require this Court to reconsider its teaching in *Smith*. For example, in *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), a generally applicable, facially neutral law requiring an autopsy was applied to an

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[10] This exemption was recently reinstated pending administrative review.

Orthodox Jew who died in an auto accident, even though this regulation placed a significant burden on a sincerely held religious tenet. This sacrilege was justified by a strikingly unimportant governmental interest, and was manifestly not the least restrictive alternative means of effectuating the government's interests in ascertaining the cause of death of its citizens. In *You Vang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990), *reconsidered and dismissed*, 750 F. Supp. 558 (D.R.I. 1990), another district court "regretfully" dismissed on the basis of *Smith* its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In *St. Agnes Hospital v. Riddick*, 748 F. Supp. 319 (D. Md. 1990), the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of this Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored this Court's suggestions that "it is desirable" for the political branches to provide free exercise exemptions. See *Doe v. Bolton*, 410 U.S. 179, 184, 205 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

In *Salvation Army v. Dep't of Community Affairs*, 919 F. 2d 183 (3d Cir. 1990), the court decided that *Smith* required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious

need to know the identity of the down and outers aided by the Salvation Army. Under *Smith*, however, the church must now claim its exemption from the state's reporting requirements – which the court acknowledged would dissuade people in need of help from participating in the church's rehabilitation program – by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In a little publicized case, the City of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order on the second floor of a walk-up because the facility did not have an elevator. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity – the view that it is better for the homeless to sleep in the street than in a building without an elevator. Under *Smith* analysis, however, the bureaucracy wins, and the nuns and the homeless lose. See Sam Roberts, "Fight City Hall? Nope, Not Even Mother Teresa," *New York Times* Sept. 17, 1990, at B1, col 1.

In *Hunafa v. Murphy*, 907 F. 2d 46 (7th Cir. 1990), a court of appeals remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that *Smith* "had cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences." *Id.* at 48.

This political and judicial overkill is akin to the reaction against the Jehovah's Witnesses in the wake of this Court's first flag salute case, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), including licensing of the Witnesses in order to drive them out of a State, and waves of violent attacks on the Witnesses both by the police and by vigilante mobs. See, e.g., P. Irons, *The Courage of Their Convictions* 22-23 (1988).

This Court could not have intended all of the far-reaching and outrageous results discussed above, whether in the 1940s or in the 1990s. It may be premature for the Court to undertake a review of its teaching in *Smith*, and *amici* note that the Petitioners do not request the Court to do so in this case. But it is not too early for the Court to correct some profound misunderstandings of what this Court actually said in *Smith*. This case is an apt vehicle for the Court to clarify at once that the *Smith* case did not contemplate a casual attitude among the judiciary about religious discrimination. On the contrary, as suggested in Part III above, the *Smith* court taught more emphatically than before that when a statute or ordinance targets a religious practice for hostile treatment – as the Hialeah ordinances at issue here do – that result can only be justified by a truly compelling governmental interest *in religious discrimination* and by a showing that the governmental burden placed on religion by the regulation is the least restrictive alternative. No such showing was required or made in the courts below.

Daniel Carroll, a Member of the First Congress from Maryland, stated in the floor debate on the First Amendment: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of

governmental hand." See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 126 (1964). The very visible and virtually omnipresent hand of governmental regulation is now dealing heavier blows on religion than Carroll or any of the framers could ever have anticipated 200 years ago.

As the nation celebrates the bicentennial of the Bill of Rights, it is time for this Court to restrain the governmental hand touching the rights of conscience, at least when the government acts as it did in Hialeah with such ill-disguised hostility toward a vulnerable religious minority. In the words of the Williamsburg Charter, "Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities." *The Williamsburg Charter* 8 J. Law & Relig. 5, 8 (1990).

CONCLUSION

This case presents important issues in need of review at once. The Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX A

James E. Andrews, as the Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.), a national Christian denomination with nearly 3 million members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. In joining this brief the Stated Clerk wishes to make six statements: (1) The Church entirely rejects and has never participated in the practice of animal sacrifice. As early as 1875, the General Assembly condemned all acts of cruelty to animals as "utterly abhorrent to the spirit of the Gospel," and addressed cruelty to animals again in 1990. (2) Cruelty to animals is a serious matter, but not one made worse by animal sacrifice for religious reasons. (3) Animal sacrifice is an ancient religious practice predating even Judaism, Christianity, and Islam. (4) The beliefs held by the petitioners are sincerely held and are protected by the First Amendment. (5) In "God Alone Is Lord of the Conscience," a policy statement regarding religious liberty adopted in 1988 by the 200th General Assembly, the Church stated: "Churches have a right of autonomy protected by the Free Exercise Clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention. The government must assert a compelling interest and demonstrate an imminent threat to public safety before the right of autonomy may be set aside in specific instances and government permitted to interfere with internal church activities." (6) This case exemplifies the disturbing trend of courts to broadly misapply this Court's ruling in *Employment Division v. Smith*

and thus harshly burden the free exercise of religion. The Stated Clerk urges this Court to grant the writ to rectify the broad misapplication of the *Smith* decision in this case and to provide needed guidance to other courts. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the members of the Church.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, which was organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to ensuring the American people's continued enjoyment of the strong protections afforded religious freedom by the Free Exercise Clause of the First Amendment; and it supports the religious freedom rights of Protestants, Catholics, Jews, and others through a wide range of activities.

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated

the importance of free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination on the basis of religion.

First Liberty Institute (FLI) at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty – rights, responsibilities, and respect – as common core values essential for good citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The Rutherford Institute and its affiliates are nonprofit corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With 40 state chapters, international chapters in several countries on three continents, and international headquarters in Charlottesville, Virginia, the Rutherford Institute assists litigants and participates in significant cases relating to the right of religious freedom. The Institute has specialized in litigation in state and federal courts and has participated as counsel for *amici curiae* in numerous cases before this Court.